No. 15-138

IN THE

Supreme Court of the United States

RJR NABISCO, INC., *et al.*,

Petitioners,

v.

THE EUROPEAN COMMUNITY, acting on its own behalf and on behalf of the Member States it has power to represent, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether, or to what extent, the Racketeer Influenced and Corrupt Organizations Act ("RICO") applies extraterritorially.

PARTIES TO THE PROCEEDING

Petitioners, who were Defendants and Appellees below, are R. J. Reynolds Tobacco Company (a North Carolina corporation), RJR Nabisco, Inc., RJR Acquisition Corp., RJR Nabisco Holdings Corp., R.J. Reynolds Tobacco Holdings, Inc., R. J. Reynolds Global Products, Inc., Reynolds American Inc., and R. J. Reynolds Tobacco Company (a New Jersey corporation).

Respondents, who were Plaintiffs and Appellants below, are the European Community, Republic of Austria, Kingdom of Belgium, Republic of Bulgaria, Republic of Cypress, Czech Republic, Kingdom of Denmark, Republic of Estonia, Republic of Finland, French Republic, Federal Republic of Germany, Hellenic Republic, Republic of Hungary, Republic of Ireland, Italian Republic, Republic of Latvia, Republic of Lithuania, Grand Duchy of Luxembourg, Republic of Malta, Kingdom of the Netherlands, Republic of Poland, Portuguese Republic, Romania, Slovak Republic, Republic of Slovenia, Kingdom of Spain, and Kingdom of Sweden.

The corporate-disclosure statement set forth in the petition for certiorari remains accurate and complete.

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OPINIONS BELOW

The district court's opinion dismissing Respondents' RICO claims (Pet.App. 37a) appears at 2011 U.S. Dist. LEXIS 23538. The Second Circuit's opinion reversing (Pet.App. 1a) is reported at 764 F.3d 129, and its opinion denying panel rehearing (Pet.App. 55a) is reported at 764 F.3d 149. The opinions respecting the Second Circuit's denial of rehearing en banc (Pet.App. 59a) are reported at 783 F.3d 123.

JURISDICTION

The Second Circuit entered judgment on April 23, 2014. Pet.App. 1a. The panel denied rehearing and issued an amended opinion on August 20, 2014. Pet.App. 55a. The court denied rehearing en banc on April 13, 2015. Pet.App. 59a. Justice Ginsburg extended the time for filing a petition for certiorari to and including July 27, 2015, No. 15A24, and the petition was filed that date. Title 28 U.S.C. § 1254(1) confers jurisdiction.

STATUTORY PROVISIONS INVOLVED

RICO's text is set forth in the appendix hereto.

STATEMENT OF THE CASE

In *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), this Court emphatically reaffirmed the presumption that federal statutes do not apply extraterritorially, sternly admonished the Second Circuit for its disregard of that presumption, and squarely held that, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Id.* at 255. If the presumption against extraterritoriality is not rebutted, the Court further explained, the "focus" of a statute—the object of its solicitude or target of its regulation—applies only domestically. *Id.* at 266-67. Applying these principles, the Court held that § 10(b) of the Securities Exchange Act of 1934 has as its "focus" the purchase and sale of securities, lacks any clear indication of extraterritoriality, and thus applies only to domestic purchases and sales. *See id.* at 261-70. Accordingly, the Court ordered dismissal of a "foreign cubed" complaint alleging that a foreign issuer had defrauded a foreign plaintiff in connection with a foreign securities transaction. *Id.*

This case presents the question whether RICO applies extraterritorially, and if so to what extent. Despite *Morrison*'s admonition to rigorously apply the presumption against extraterritoriality, the panel below—in one fell swoop—made its own foreign-cubed expansion of RICO to cover foreign patterns of racketeering, foreign enterprises, *and* foreign injuries. It thus reinstated respondents' thrice-dismissed claims that petitioners, through alleged money laundering in Central and South America, facilitated an illegal scheme by narcotics traffickers in South America and Europe, and

caused wide-ranging harms in Europe to European governments. Whatever the precise geographic scope of RICO, it cannot possibly reach that far.

A. Statutory Background

Congress enacted RICO as Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified as amended at 18 U.S.C. § 1961 *et seq.*). Congress found that "organized crime in the United States" is economically powerful, uses its power "to infiltrate and corrupt legitimate business[es]," and thereby threatens "the stability of the Nation's economic system." 84 Stat. at 922-23. Accordingly, the stated "purpose" of the Organized Crime Control Act was "to seek the eradication of organized crime in the United States," *id.* at 923, and RICO targeted the problem of "infiltration of legitimate businesses by organized crime." *United States v. Turkette*, 452 U.S. 576, 591 (1981). RICO thus addresses various ways in which organized crime can take over and manipulate businesses, labor unions, and other enterprises.

RICO's criminal prohibition, 18 U.S.C. § 1962, forbids three primary categories of conduct, each involving a "pattern of racketeering activity" used to impact an "enterprise." Section 1962(a) makes it unlawful to use or invest income from a "pattern of racketeering activity" to acquire any interest in an "enterprise." Section 1962(b) makes it unlawful to acquire or maintain any interest in an "enterprise" through a "pattern of racketeering activity." Section 1962(c) makes it unlawful to use a "pattern of racketeering activity" to conduct the affairs of an "enterprise." Finally, § 1962(d) makes it unlawful to conspire to violate any of these three prohibitions.

RICO defines the critical terms "enterprise" and "pattern of racketeering activity." A covered "enterprise" "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id.* § 1961(4). The "enterprise" must be distinct both from the racketeering acts, *Turkette*, 452 U.S. at 583, and from the "person" who commits them, *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001).

A covered "pattern of racketeering" consists of "at least two acts of racketeering activity" committed within a ten-year period. 18 U.S.C. § 1961(5). In turn, "racketeering activity" includes (A) a series of specified crimes "chargeable under State law" and (B) "any act which is indictable under any of the following provisions of title 18," followed by a string-cite to well over 100 provisions. *Id.* § 1961(1). That list includes many predicate offenses that apply only domestically, such as mail fraud, wire fraud, and the Travel Act, *id.* §§ 1341, 1343, 1952; some predicate offenses that apply both domestically and extraterritorially, such as money laundering and providing material support to foreign terrorist organizations, *id.* §§ 1956-57, 2332b(g)(5)(B), 2339B; and a few predicate offenses that apply only extraterritorially, such as the prohibition on killing a U.S. national "outside the United States," *id.* § 2332(a).

RICO provides for a range of criminal and civil enforcement. Section 1963 imposes criminal penalties for violations of § 1962. Sections 1964(a) and (b) authorize the Attorney General to bring civil

actions to prevent and restrain violations of § 1962. Finally, § 1964(c) affords a private civil cause of action—plus treble damages and attorneys' fees—to "[a]ny person injured in his business or property by reason of a violation of section 1962."

B. Respondents' Allegations

Petitioners are the R.J. Reynolds Tobacco Company and various corporate affiliates. Respondents are the European Community ("EC") (now the European Union) and 26 of its Member States. Respondents sued petitioners under RICO; they allege that petitioners were involved in a worldwide scheme to launder the proceeds of illegal drug sales in Europe, which harmed European governments in Europe.

The alleged money-laundering scheme consisted of at least five discrete sets of transactions. First, foreign drug traffickers, located in Afghanistan, Colombia, and Russia, smuggled illegal narcotics into Europe and sold them there for Euros. Pet.App. 152a-153a. Second, the traffickers traded those Euros for other foreign currencies, in transactions with currency brokers also located in Europe. Pet.App. 153a-155a. Third, the currency brokers sold the Euros to European cigarette importers. Pet.App. 156a. Fourth, the European importers used those funds to purchase cigarettes from wholesalers. *Id.* Fifth and finally, the wholesalers in turn purchased cigarettes from petitioners, and shipped them to the importers for sale in Europe. Pet.App. 158a-159a. The wholesalers were located in such foreign countries as Colombia, Croatia, Panama, and Venezuela; and in-person sales allegedly occurred in those locales. Pet.App. 166a,

170a-171a, 174a-77a, 190a-191a. The complaint further alleges that petitioners unlawfully sold cigarettes within Iraq, in territory controlled by a foreign terrorist organization. Pet.App. 177a-181a.

The complaint alleges a single RICO "enterprise" consisting of petitioners, drug traffickers, and various "distributors, shippers, currency dealers, wholesalers, money brokers, and other participants." Pet.App. 237a-238a. It alleges a "pattern of racketeering activity" consisting of predicate acts of money laundering, mail fraud, wire fraud, Travel Act violations, and providing material support to foreign terrorist organizations. Pet.App. 238a-250a. And it alleges some 36 different injuries to European governments in Europe—including lost tax revenue, increased law-enforcement costs, various harms to their economies, and reduced sales and profits to state-owned tobacco businesses. Pet.App. 210a-227a.[1]

C. Procedural History

1. This litigation has been active for over 15 years, though the claims have never survived a motion to dismiss. The operative complaint here is the *sixth* filed by the EC in three successive cases, all based on similar factual allegations.

The first case, filed by the EC alone, was dismissed because the EC was not a proper party to complain about alleged injuries to its Member States. *European Cmty. v. RJR Nabisco, Inc.*, 150 F. Supp. 2d 456, 501-02 (E.D.N.Y. 2001).

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[1] Respondents also assert state-law claims, Pet.App. 262a-286a, which are not at issue here.

The second case, filed by the EC and 10 of its Member States, was dismissed because it impermissibly sought recovery for injuries allegedly suffered by foreign governments in their sovereign capacities, in violation of the revenue rule and penal-law rule. *European Cmty. v. Japan Tobacco, Inc.*, 186 F. Supp. 2d 231, 236-45 (E.D.N.Y. 2002), *aff'd sub nom. European Cmty. v. RJR Nabisco, Inc.*, 355 F.3d 123 (2d Cir. 2004) (Sotomayor, J.), *vacated*, 544 U.S. 1012 (2005), *adhered to on remand*, 424 F.3d 175 (2d Cir. 2005) (Sotomayor, J.).

The third and current case, filed by the EC and 26 of its Member States, sought to avoid dismissal under the revenue and penal-law rules by alleging competitive injuries, in the form of lost sales and profits to government-owned tobacco companies in Europe. Pet.App. 210a-214a.[2]

2. Applying *Morrison*, the district court dismissed the RICO claims as impermissibly extraterritorial. The court reasoned that because

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[2] The same plaintiffs' lawyer filed similar RICO actions alleging that virtually *every* leading manufacturer of cigarettes or liquor is engaged in a global money-laundering scheme, *each* of which has caused competitive injuries to foreign governments. Although the claims against the cigarette manufacturers repeatedly were dismissed, *see RJR Nabisco*, 355 F.3d at 127, the other defendants (including Philip Morris, British American Tobacco, and Japan Tobacco) eventually settled. The claims against the liquor manufacturers barely survived a pre-*Morrison* motion to dismiss. *Republic of Colombia v. Diageo N. Am. Inc.*, 531 F. Supp. 2d 365 (E.D.N.Y. 2007). But when the defendants sought discovery, the plaintiffs voluntarily dismissed. Stipulation and Order of Dismissal (Nov. 9, 2012), E.D.N.Y. No. 04-CV-4372 (ECF No. 351).

"RICO is silent as to any extraterritorial application," it therefore "has none." Pet.App. 44a. So the court looked to the "focus" of RICO to determine what is a permissible domestic application. Pet.App. 45a-48a. It held that, because RICO is focused on the "enterprise" corrupted by the racketeering pattern, the statute extends only to domestic enterprises. *Id.*

The court then concluded that the complaint does not allege a domestic enterprise. The court applied the "nerve center" test from *Hertz Corp. v. Friend*, 559 U.S. 77 (2010), which looks to where the entity is controlled. Pet.App. 48a. Here, the alleged money-laundering enterprise was controlled by foreign drug traffickers, with petitioners as "nothing more than sellers of fungible goods in a complex series of transactions directed by South American and Russian gangs." Pet.App. 52a.

3. On appeal, a Second Circuit panel reversed. As framed by the parties, the only disputed issue was what constitutes a permissible domestic application of RICO. Yet the panel, taking a different view from those expressed by the litigants and by all prior decisions, held that RICO applies extraterritorially. Its original opinion extended the substantive provisions of RICO to foreign patterns of racketeering activity and foreign enterprises, and its opinion on rehearing further extended civil RICO to foreign injuries. In sum, the court ruled that civil RICO extends to *foreign* racketeering patterns in connection with *foreign* enterprises and causing *foreign* injury.

First, the panel extended RICO to foreign racketeering patterns. It held that "RICO applies extraterritorially if, and only if, liability or guilt

could attach to extraterritorial conduct under the relevant RICO predicate." Pet.App. 9a. The panel reasoned that, by "incorporating" extraterritorial crimes "into RICO" as predicate offenses, Congress "clearly communicated its intention" that RICO itself apply extraterritorially. Pet.App. 11a.

Next, the panel extended RICO to foreign enterprises. Without citing any textual basis, the panel reasoned that limiting RICO to domestic enterprises would be "illogical," because "[s]urely the presumption against extraterritorial application ... does not command giving foreigners carte blanche to violate the laws of the United States in the United States." Pet.App. 14a.

Applying these rules, the panel held that the RICO claims alleged were viable. The panel reasoned that, because the money-laundering and material-support statutes by their terms apply extraterritorially, RICO likewise applies to extraterritorial patterns of racketeering activity predicated on violations of those statutes, even in connection with foreign enterprises. Pet.App. 17a-18a. The court acknowledged that the mail fraud, wire fraud, and Travel Act statutes do not apply extraterritorially, but it held that the complaint adequately alleged domestic violations of those statutes. Pet.App. 18a-24a.

Finally, in response to Petitioners' rehearing petition—which explained that the panel had ignored their contention that private plaintiffs seeking treble damages under § 1964(c)'s civil remedy must allege a domestic injury, regardless of the geographic reach of § 1962's criminal prohibition—the panel issued a second opinion

extending § 1964(c) to foreign injuries. It reasoned that § 1964(c) applies to any injury "'caused by predicate acts sufficiently related to constitute a pattern.'" Pet.App. 56a (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 (1985)). And it further reasoned that the presumption against extraterritoriality is "primarily concerned with the question of what *conduct* falls within a statute's purview," not with the question whether a private right of action extends to foreign *injuries*. Pet.App. 58a. On this view, if the underlying criminal prohibition applies extraterritorially, then the private right of action necessarily follows along, regardless of where the plaintiff was injured.

4. Petitioners sought rehearing en banc. More than seven months later, the court denied it by an 8-5 vote, prompting one published concurrence and four published dissents.

Judge Cabranes, joined by Judges Jacobs, Raggi, and Livingston, decried the panel's discovery of "a new, and potentially far-reaching, judicial interpretation" of RICO "that finds little support in the history of the statute, its implementation, or the precedents of the Supreme Court; that will encourage a new litigation industry exposing business activities abroad to civil claims of 'racketeering'; and that will invite our courts to adjudicate civil RICO claims grounded on extraterritorial activities anywhere in the world." Pet.App. 73a-74a (footnotes omitted).

Judge Raggi, writing for the same four judges, explained that the panel had opened these floodgates by misapplying both the focus and clear-indication prongs of *Morrison*. In particular, the panel made

"no identification of RICO's 'focus,' as seemingly required by *Morrison*," and instead assumed implicitly—and erroneously—that RICO's "focus" is the "individual predicate acts" alleged to comprise the "pattern" of racketeering. Pet.App. 92a-93a. Moreover, the panel further erred in supposing that "the inclusion of extraterritorially reaching crimes in the list of RICO predicates" constituted a clear indication that RICO extends even to foreign patterns of racketeering, much less to "foreign enterprises conducted through essentially foreign patterns of racketeering." Pet.App. 86a.

Judges Jacobs (Pet.App. 68a) and Lynch (Pet.App. 97a) issued separate dissents.

SUMMARY OF ARGUMENT

I. Federal statutes are presumed not to apply extraterritorially.

A. This longstanding presumption serves many important interests. It helps effectuate congressional intent, protects against unintentional international friction, and reserves for Congress delicate decisions about foreign affairs.

B. *Morrison* establishes the framework for assessing extraterritoriality issues. The first question is whether the presumption has been rebutted, which turns on whether there is a clear indication that Congress authorized extraterritorial application. The second question is whether the application involved is in fact extraterritorial, which turns on whether the "focus" of the statute is being applied domestically.

II. RICO's substantive prohibitions, 18 U.S.C. § 1962, do not reach the corruption of foreign enterprises.

A. The "focus" of these provisions is on the corruption of enterprises. RICO's title, statutory findings, and jurisdictional hook all focus on the enterprise, not on the underlying predicate acts or racketeering pattern. Its purpose and history confirm that its novel approach was to protect organizations from infiltration or corrupt influence by organized crime or other malefactors. Its three-part structure reinforces the point, by setting forth the various ways in which an enterprise may be taken over and corrupted. Finally, its civil remedies provision confirms the enterprise focus.

B. RICO contains no clear indication that it extends to the corruption of foreign enterprises. Its text is silent on whether foreign enterprises are covered, and its statutory context affirmatively suggests that it is limited to domestic enterprises. This is particularly obvious for § 1962(a) and (b), and § 1962(c) must bear the same meaning.

C. The panel erred in myriad respects. It failed entirely to identify the "focus" of RICO. Its policy arguments fall far short of establishing a clear textual indication that RICO covers foreign enterprises. And its contention that the geographic scope of the "pattern" element follows the geographic scope of the predicate statutes is entirely irrelevant to the scope of the "enterprise" element, and also wrong on its own terms.

III. RICO's private cause of action, 18 U.S.C. § 1964(c), does not reach foreign injuries.

A. The "focus" of this provision is on the private injuries caused by RICO violations. This Court has made clear that different provisions in a statute can have different foci and thus different geographic sweep. And in making the policy decision to authorize a private right of action in addition to public enforcement, Congress focused on redressing certain economic injuries flowing from RICO violations.

B. RICO's private cause of action contains no clear indication that it reaches foreign injuries. Its text is silent on whether foreign injuries are covered, and its background legal context affirmatively suggests that it is limited to domestic injuries.

C. The panel erred in holding that the presumption against extraterritoriality applies only to laws substantively regulating conduct, not those redressing injury. Numerous decisions refute that contention, and make clear that the presumption against extraterritoriality applies to all legislative provisions, including remedial and procedural ones.

IV. Under the proper legal standards, the RICO claims here must be dismissed. The complaint does not allege any domestic enterprise, instead accusing Petitioners only of facilitating a foreign enterprise that is directed and controlled by criminal gangs based in Europe, South America, and Asia. The complaint also does not adequately allege any domestic injury, instead seeking redress only for foreign harms to European governments.

ARGUMENT

The panel below simultaneously extended civil RICO to foreign *enterprises*, foreign *patterns of racketeering*, and foreign *injuries* to foreign *plaintiffs*. Moreover, while the defendants here are U.S. corporations, the ruling below applies equally to foreign *defendants*. Whatever the precise geographic scope of RICO, this extravagant and unprecedented expansion—to what is fairly described as foreign-to-the-fourth or foreign-to-the-fifth civil RICO claims—cannot possibly be right. Not surprisingly, the panel's judgment rests on several fundamental errors in applying this Court's extraterritoriality jurisprudence and in construing RICO.

Most obviously, the panel never even attempted to determine the "focus" of the substantive provisions in § 1962—despite *Morrison*'s bedrock holding that the "focus" of a statute applies only domestically absent a clear indication to the contrary. Even a cursory examination of RICO reveals that its substantive provisions "focus" on the *enterprise* impacted by the pattern of racketeering activity, not on the *predicate offenses* that constitute the pattern, despite the panel's fixation on the latter.

Moreover, in looking for a clear indication of extraterritoriality, the panel reasoned that, because certain predicate statutes apply extraterritorially, § 1962 must likewise apply to foreign patterns of such predicate offenses. As explained below, the panel's conclusion does not follow from its premise, and it conflicts with the unanimous view of other lower courts that RICO does *not* contain *any* clear indication of extraterritoriality. But, even more fundamentally, the panel's conclusion is irrelevant:

its analysis of the relationship between *predicates* and *pattern* does not even arguably suggest a clear indication that § 1962 applies to foreign *enterprises*. As to that element—the most critical in light of RICO's "focus"—the panel cited no textual indication of extraterritoriality at all (much less a clear one), but only its own views of sound policy, which are both legally irrelevant and factually misguided.

Finally, although *Morrison* expressly requires separate inquiries for different statutory provisions, the panel engaged in virtually no analysis of the geographic scope of the private right of action in § 1964(c). The "focus" of that provision is obviously the private *injuries* that Congress sought to redress, and RICO gives no hint—much less a clear indication—of application to *foreign* injuries. The panel did not dispute any of this, instead reasoning that the presumption against extraterritoriality governs only questions about conduct and simply *does not apply* to questions about injury. That assertion is conceptually unsound and doctrinally foreclosed by numerous decisions of this Court.

I. UNLESS CONGRESS CLEARLY PROVIDES OTHERWISE, FEDERAL STATUTES APPLY ONLY DOMESTICALLY

"It is a longstanding principle of American law that 'legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) ("*Aramco*") (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1941)). Thus, "[w]hen a statute has no clear indication of an extraterritorial application, it has none." *Morrison*, 561 U.S. at 255. As this Court

reaffirmed in *Morrison* and *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), the presumption serves vital interests and has real force.

A. The Presumption Against Extraterritoriality Serves Many Important Purposes

The presumption against extraterritoriality "represents a canon of construction ... rather than a limit upon Congress's power to legislate." *Morrison*, 561 U.S. at 255. It is "rooted in a number of considerations." *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993).

First, the presumption reflects the "commonsense notion that Congress generally legislates with domestic concerns in mind." *Id.*; *see also Foley Bros.*, 336 U.S. at 285. Because Congress's basic duty is to legislate for this Nation, not the world at large, silence as to extraterritorial force of a statue is most naturally construed as an implied limitation to domestic affairs. Thus, where Congress does not "clearly express[]" an "affirmative intention" that a statute apply abroad, *Aramco*, 499 U.S. at 248, the presumption simply "ascertain[s]" the "unexpressed congressional intent" that the law should not so apply, *Foley Bros.*, 336 U.S. at 285, and thus reflects the commonsense "notion that some things 'go without saying,'" *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014).

Second, the presumption "'serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.'" *Kiobel*, 133 S. Ct. at 1664 (quoting *Aramco*, 499 U.S. at 248); *see also Morrison*,

561 U.S. at 255; *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173-74 (1993). Applying U.S. law abroad "not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent." *N.Y. Cent. R.R. Co. v. Chisholm*, 268 U.S. 29, 32 (1925) (quoting *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909)). Other countries—including European states who are parties here—have long "resented and protested" the perceived "excessive intrusions into their own spheres" of U.S. legislation. *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 609 (9th Cir. 1976); *see also, e.g.*, Alexander Layton & Angharad M. Parry, *Extraterritorial Jurisdiction—European Responses*, 26 HOUS. J. INT'L L. 309, 315-16 (2004). Presuming that U.S. law "governs domestically but does not rule the world" thus fosters international comity in addition to effectuating Congress's likely intent. *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007).

Finally, the presumption respects Congress's unique role in the "delicate field of international relations." *Kiobel*, 133 S. Ct. at 1664 (quoting *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)). "[Congress] alone has the facilities necessary" to make the "important policy decision[s]" whether or to what extent to export U.S. law across the globe. *Benz*, 353 U.S. at 147. And, in doing so, Congress is "able to calibrate its provisions in a way that [courts] cannot." *Aramco*, 499 U.S. at 259. A clear presumption thus "preserve[s] a stable background against which Congress can legislate with predictable effects." *Morrison*, 561 U.S. at 261.

And a presumption *against* extraterritoriality "helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign-policy consequences not clearly intended by the political branches." *Kiobel*, 133 S. Ct. at 1664.

B. The Presumption Requires Congress To Provide A "Clear Indication" That A Statute's "Focus" Extends Extra-territorially

While the presumption has existed for nearly as long as Congress has legislated, *Morrison* offered important clarifications about its application. Strongly reaffirming the presumption and rejecting the Second Circuit's disregard of it, *Morrison* framed two critical questions. *First*, has the presumption against extraterritoriality been rebutted? *Second*, as important, what counts as an "extraterritorial" application of the statute involved?

1. To determine whether the presumption has been rebutted, courts must consider whether the statutory text or structure reveals a "clear indication of an extraterritorial application." *Morrison*, 561 U.S. at 255. Countless statutes show that Congress knows how "to make a clear statement that a statute applies overseas" when it wants to. *Aramco*, 499 U.S. at 258 (collecting examples). But absent such "a clear indication" of extraterritoriality, a statute "has none." *Morrison*, 561 U.S. at 255.

Because *Morrison* held that the presumption was not rebutted as to § 10(b) of the Securities Exchange Act of 1934, *see id.* at 262-65, the case is especially instructive on what statutory features do *not* count as a "clear indication" of extraterritoriality.

First, because a party asserting extra-territoriality must identify "specific language" that "speak[s] directly" to that question, *Aramco*, 499 U.S. at 250, 252, merely "possible interpretations of statutory language" do not suffice. *Morrison*, 561 U.S. at 264; *see also Aramco*, 499 U.S. at 253 (presumption not rebutted by "possible, or even plausible, interpretations"); *Sale*, 509 U.S. at 176 ("it is possible" that statutory amendment "removed any territorial limitation," but that "possibility" is "not a substitute" for "affirmative evidence of intended extraterritorial application").

Second, general terms that could be interpreted to subsume extraterritorial application do not suffice. For example, a "general reference to foreign commerce" in a jurisdictional hook does not defeat the presumption. *Morrison*, 561 U.S. at 263; *see also Aramco*, 499 U.S. at 251-52 (presumption not rebutted by "statutes that contain broad language in their definitions of 'commerce' that expressly refer to '*foreign* commerce'"); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 15 n.3, 19-20 (1963). Congress may assert legislative jurisdiction based on impacts on foreign commerce, but that does not clearly establish an intent to make federal law extraterritorial. The reason is plain: even domestic entities or conduct can affect "foreign commerce," and so Congress's invocation of its foreign-commerce power does not clearly indicate an intent to regulate extraterritorially.

Similarly, "it is well-established that generic terms like 'any' or 'every' do not rebut the presumption against extraterritoriality." *Kiobel*, 133 S. Ct. at 1665. Thus, a conferral of jurisdiction over

"*any* civil action" does not "suggest application to torts committed abroad." *Id.* Likewise, a statutory reference to "[e]very contract made to which the United States ... is a party" does not apply to contracts under which American citizens worked for the United States in foreign countries. *Foley Bros.*, 336 U.S. at 282, 287-88; *see also Small v. United States*, 544 U.S. 385, 388 (2005) ("convicted in any court" does not include convictions in foreign courts).

Finally, even when Congress provides a clear statement of *some* extraterritorial application, the presumption "'operates to limit that provision to its terms.'" *Kiobel*, 133 S. Ct. at 1667 (quoting *Morrison*, 561 U.S. at 265); *see also Microsoft*, 550 U.S. at 456 (presumption "remains instructive in determining the *extent* of the statutory exception"). For instance, although § 30(a) of the Exchange Act expressly applies to transactions outside the U.S., that does not establish that the "rest of the Exchange Act" also has such application; to the contrary, the contrast between the clarity of § 30(a) and the silence of the Act's other provisions suggests just the opposite. *See Morrison*, 561 U.S. at 265.

2. *Morrison* also clarifies how to distinguish between domestic and extraterritorial applications of a statute. That is important because, after all, "it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States." *Id.* at 266. And the presumption "would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." *Id.* The question thus arises: What sort of contact makes application of the statute "domestic" or "extraterritorial"?

Morrison answered that courts must look to "the 'focus' of congressional concern," defined by what "the statute seeks to regulate," or "the objects of the statute's solicitude." *Id.* at 266-67 (quoting *Aramco*, 499 U.S. at 255). Where the matters that were Congress's "focus" all occur domestically, the contested application is domestic even if other foreign contacts are present, and thus the presumption against extraterritoriality does not arise. *See Pasquantino v. United States*, 544 U.S. 349, 371 (2005). Conversely, where a matter that was Congress's "focus" occurs abroad, applying the statute is extraterritorial, even if other domestic contacts are present. *Morrison*, 561 U.S. at 266. Accordingly, *Morrison* rejected the more expansive "conduct" and "effects" tests, under which a statute could apply "domestically" if any "significant conduct" or "significant effect" occurred in the U.S., regardless of whether the conduct or effect matched the "focus" of the statute or the claims of the plaintiff. *Id.* at 258. The Second Circuit had developed those tests to determine "what Congress would have wanted if it had thought of the situation before the court," but this Court repudiated such "judicial speculation" and its "unpredictable and inconsistent" results. *Id.* at 255, 260-61. Rather, *Morrison* held, application of a statute is domestic only where the domestic contacts match the statutory focus. *See id.* at 267.

Applying this framework, *Morrison* held that § 10(b) of the Exchange Act does not apply to deception in connection with foreign securities transactions—even if the deceptive acts occur in the U.S. The Court explained that the "focus" of § 10(b)

is on "purchases and sales of securities," and the presumption therefore limits that provision to *domestic* securities transactions. 561 U.S. at 266-67. The existence of deception in the U.S. is thus insufficient to make application of § 10(b) domestic: the focus of § 10(b) is deception "in connection with" securities transactions, not deception *"simpliciter,"* and so "where the deception originated" is not controlling. *Id.* at 266, 271-72.

Prior cases have used similar reasoning. For example, *Aramco* held that Title VII does not apply to "employment practices of United States employers who employ United States citizens abroad." 499 U.S. at 246-47. And *Aramco* so held even though the employee was also hired in the U.S. *Id.* As the Court explained, Title VII's "focus" is not the nationality of either the employer or the employee. *See id.* at 255. Instead, Title VII's "focus" is employment, and thus the presumption limits the statute to domestic employment. *Id.* at 255-56. And because the specific claims involved did not challenge the domestic hiring, but rather subsequent harassment and discharge that occurred abroad, Title VII was inapplicable. *Id.* at 247-49, 259.[3] Similarly, in *Foley Brothers*, this Court held that a maximum-hours law did not apply to work performed abroad by an American under a contract

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[3] Congress subsequently amended Title VII to extend protection to U.S. citizens, but not foreign citizens, working overseas. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 512 n.8 (2006). This confirms that "Congress knows how to give a statute explicit extraterritorial effect—and how to limit that effect to particular applications." *Morrison*, 561 U.S. at 265 n.8.

with the U.S. 336 U.S. at 281. Again, Congress's focus was on "labor conditions," so the presumption limited the statute to "domestic" labor conditions, *id.* at 286, and thus the nationality of neither the employee nor the employer sufficed to make the contested application domestic. *See id.* at 282-83.

Numerous other cases confirm the basic principle that, absent a clear contrary indication, a statute applies only where domestic contacts match its focus. *E.g.*, *Sale*, 509 U.S. at 177 (provision of Immigration and Nationality Act applies to "domestic procedures by which the Attorney General determines whether deportable and excludable aliens may remain in the United States," not to Coast Guard actions on high seas); *Benz*, 353 U.S. at 143-44 (Labor Management Relations Act applies to "industrial strife between American employers and employees," not to "labor disputes between nationals of other countries operating ships" in U.S. waters); *Chisholm*, 265 U.S. at 31-32 (Federal Employers' Liability Act applies to injuries occurring in the U.S., not to Americans injured on American railroads in other countries). Domestic contacts beyond the statutory focus do not make application of the statute "domestic."

* * *

In sum, under the presumption against extraterritoriality, courts must determine the "focus" of the federal statute involved and must limit it to domestic applications unless Congress provides a "clear indication" that foreign applications are covered too.

II. RICO DOES NOT REACH CORRUPTION OF FOREIGN ENTERPRISES

The panel below misapplied these extra-territoriality principles to RICO in general, and to § 1962 in particular. Without any consideration of the statute's "focus," the panel reasoned that because some of RICO's predicate statutes apply extraterritorially, a RICO "pattern" must apply extraterritorially to the same extent. Pet.App. 9a-13a. Then, despite admitting that RICO is silent as to the "geographic scope of the enterprise," the panel separately extended § 1962 to foreign enterprises, based on its view that there would otherwise be "illogical" gaps in the statute's coverage. Pet.App. 13a-15a. To best expose the errors in this reasoning, we address *Morrison*'s two steps in reverse order.

As to step two, the text, purpose, structure, and remedies of RICO all demonstrate that the "focus" of § 1962 is not on the underlying predicate statutes incorporated into RICO, but on the corruption of enterprises. As explained by Judge Rakoff—who literally wrote the book on RICO, *see* J. Rakoff & H. Goldstein, RICO: CIVIL AND CRIMINAL LAW AND STRATEGY (2015)—RICO is "not a recidivist statute" further punishing repeated predicate offenses, but rather an innovative prohibition targeting the use of a pattern of racketeering "to impact an enterprise." *Cedeño v. Intech Grp., Inc.*, 733 F. Supp. 2d 471, 473 (S.D.N.Y. 2010). Accordingly, it is the enterprise that must be domestic, absent a clear indication that Congress intended to protect foreign enterprises.

As to step one, with the relevant "focus" of § 1962 in mind, the panel's analysis of textual indications falls apart. Its conclusion that a RICO "pattern"

extends extraterritorially with the predicate statutes is wrong on its own terms—and inconsistent with an otherwise unanimous body of precedent recognizing that RICO itself, as opposed to its predicate statutes, contains no clear indication of extraterritoriality. More fundamentally, the panel's analysis addresses entirely the wrong question: the geographic scope of the "pattern," rather than the geographic scope of the "enterprise." As to the latter question, there is no textual indication at all, much less any clear indication, that § 1962 applies extraterritorially to criminalize the corruption of foreign enterprises. Accordingly, § 1962 applies only to domestic enterprises.

A. The "Focus" Of RICO's Substantive Prohibitions Is On The Corruption Of Enterprises

Congress enacted RICO to address the serious threat of "organized crime in the United States." 84 Stat. at 922; *see Turkette*, 452 U.S. at 588-93. "Earlier steps to combat organized crime" had failed, largely because existing laws "targeted individuals engaged in racketeering activity," rather than the ways in which organized crime perpetuated itself by infiltrating and exerting corrupt influence over other organizations. *Alexander v. United States*, 509 U.S. 544, 561 (1993) (Kennedy, J. dissenting).

In RICO, Congress sought to remedy that flaw. Its novel approach was to target not the underlying racketeering, but the corrupt infiltration and control of businesses, labor unions, and other distinct enterprises. Structurally, the statute incorporates a wide swath of "racketeering" offenses already illegal under state and federal law—including "murder,

kidnapping, gambling, arson, robbery, bribery, extortion," and other offenses commonly used by organized crime. 18 U.S.C. § 1961(1). Section 1962 then makes it a new, separate felony to engage in a "pattern" of such activity as a means to infiltrate, acquire, or operate an "enterprise," *id.* § 1962, broadly defined to include any sort of organized entity, *id.* § 1961(4).

RICO's innovation was therefore to focus on how organized crime would corrupt "enterprises." *See generally* Gerard E. Lynch, *RICO: The Crime of Being a Criminal*, 87 COLUM. L. REV. 661 (1987). That focus—and the subordinate or "predicate" role of the racketeering acts typically associated with organized crime—is reflected in the text, structure, history, and remedies of RICO, as well as this Court's precedents. Together, these indicia firmly show that the object of Congress's solicitude was the enterprise, and corruption of the enterprise was its focus. Judge Rakoff was thus correct to conclude that "the focus of RICO is on the enterprise as the recipient of, or cover for, a pattern of criminal activity." *Cedeño*, 733 F. Supp. 2d at 474.

1. To start, RICO's text repeatedly shows a focus on enterprise corruption, rather than the underlying predicate acts of racketeering.

First, the title of the statute, the "Racketeer Influenced and Corrupt *Organizations* Act," reveals an emphasis on the affected organization—or, in statutory parlance, the "enterprise." Moreover, RICO's title suggests that racketeering matters only insofar as it "influence[s]" or "corrupt[s]" the affected organization. If the predicate crimes had been the statutory focus of RICO, one would expect the

statute to have been called the Anti-Racketeering Act, the Combating Patterns of Racketeering Act, or, less hypothetically, a statute prohibiting "[v]iolent crimes in aid of racketeering activity" (18 U.S.C. § 1959). Instead, the enterprise was the "object[] of the statute's solicitude." *Morrison*, 561 U.S. at 267.[4]

Second, RICO includes a statement of findings and purpose, which repeatedly has informed its interpretation. *See, e.g.*, *Turkette*, 452 U.S. at 588; *Russello v. United States*, 464 U.S. 16, 26-27 (1983); *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 255 (1989) (Scalia, J., concurring in judgment). In that statement, Congress identified as its principal concern the fact that "organized crime" uses its "money and power" "to infiltrate and corrupt legitimate business and labor unions." 84 Stat. at 922-23. Echoing RICO's title, this reference confirms the statutory focus on enterprise corruption.

Third, the text of § 1962 identifies the "enterprise" as the basis for Congress's exercise of legislative power. Specifically, § 1962(a), (b), and (c) all advert to Congress's power to regulate interstate and foreign commerce by reference, not to *racketeering acts* that affect commerce, but rather to *enterprises* that "affect" or are "engaged in" commerce. Thus, what Congress "seeks to regulate" under the Commerce Clause (*Morrison*, 561 U.S. at 267) is the enterprise, not the racketeering.

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[4] Notably, § 1959(a)(1) prohibits contracting with an enterprise engaged in racketeering activity to commit murder, kidnapping, or other predicate "[v]iolent crimes." It provides a striking example of a predicate-focused racketeering statute—and a striking contrast to RICO's text and structure.

Moreover, Congress *could not* have sought to regulate the "racketeering activity" as such, because that term is defined to include a host of "State law" offenses like "murder" and "arson," unconnected to any impact on interstate or foreign commerce. *Id.* § 1961(1)(A). Yet, as this Court repeatedly has held, the Commerce Clause does not confer "a general police power" broad enough to reach such local offenses. *United States v. Lopez*, 514 U.S. 549, 567 (1995). To be constitutional, § 1962 must be read to focus on regulating *enterprises* that are "engaged in" or "affect" interstate commerce, rather than on federalizing a slew of disparate state-law crimes, many of them purely local.

2. Beyond these textual indications, this Court often has observed that RICO's "major purpose" was "to address the infiltration of legitimate business by organized crime." *Turkette*, 452 U.S. at 591; *see also H.J.*, 492 U.S. at 245 (RICO "focused on ... predations of mobsters"); *Russello*, 464 U.S. at 28 (RICO targeted "economic roots" of "organized crime" and its "corrupting influence" in "channels of commerce"). This was the specific problem that Congress thought would "weaken the stability of the Nation's economic system." 84 Stat. at 923; *see* S. Rep. No. 91-617, at 79 (1969) (describing infiltration of legitimate businesses as posing "a serious threat to the economic well-being of the Nation").

RICO's statutory history confirms this objective. When the "basic structure" of RICO "took shape," the bill was "directed solely at the investment of proceeds derived from criminal activity." *Reves v. Ernst & Young*, 507 U.S. 170, 180 (1993). That provision ultimately became § 1962(a), which, as

discussed below, is manifestly focused on the infiltration of enterprises. Although the bill later took on a broader scope, its "emphasis on infiltration of legitimate organizations remained as [it] made its way through the legislative process." Lynch, *supra*, at 678. Ultimately, "[b]oth the Senate and House committee reports accompanying the final versions of the [bill] state[d] that the purpose of RICO is 'the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce.'" *Id.* at 678 & n.83 (quoting S. Rep. No. 91-617; H.R. Rep. No. 91-1549 (1970)); *see also Turkette*, 452 U.S. at 591-92 & nn.13-14.

3. The "three-part" structure of § 1962 (*Reves*, 507 U.S. at 182-83) confirms its focus on enterprise corruption. In particular, the statutory structure tracks the various ways organized crime typically co-opts and controls businesses, unions, and other enterprises. By contrast, the subordinate role of the predicate racketeering acts in the overall scheme indicates that those disparate offenses are not the focus of RICO in general or § 1962 in particular.

RICO's primary substantive prohibitions are set forth in § 1962(a), (b), and (c). The first two of these address ways in which organized crime typically gains a foothold in an enterprise, either by using proceeds from a pattern of racketeering activity to "invest" in the enterprise, 18 U.S.C. § 1962(a), or by employing a pattern of racketeering activity to "acquire" an "interest" in the enterprise, *id.* § 1962(b). The third provision prohibits what typically happens once organized crime acquires control of an enterprise—"conduct" of its affairs through a pattern of racketeering activity. *Id.*

§ 1962(c). The statute thus criminalizes each step in "the infiltration [and] management of legitimate organizations by racketeering activity." *Reves*, 507 U.S. at 181 (emphasis omitted). Under all three provisions, it is the *corrupting influence on the enterprise* that is ultimately the touchstone for RICO liability; that is the common focus of § 1962.

Moreover, in none of these provisions does the enterprise play the role of the perpetrator. Rather, the enterprise must be "distinct" from the "person" who commits the racketeering, *Cedric Kushner*, 533 U.S. at 161, and must also exist "separate and apart" from the pattern of racketeering activity, *Turkette*, 452 U.S. at 583. The statute thus contemplates a defendant who exerts the corrupting influence, with the enterprise serving either as the "victim" of racketeering (under § 1962(a) and (b)) or the "vehicle" through which racketeering is perpetrated (under § 1962(c)). *See, e.g.*, *Cedric Kushner*, 533 U.S. at 164; *NOW v. Scheidler*, 510 U.S. 249, 259 (1994). Either way, the statutory objective is to prevent enterprise corruption.

Although each provision of § 1962 also requires a pattern of racketeering activity, the statutory structure reveals the subordinate role of the pattern—and certainly of the underlying predicate offenses—in the overall scheme. In fact, "racketeering activity" consists entirely of offenses that are *independently illegal* under separate provisions of state and federal law. 18 U.S.C. § 1961(1) (defining "racketeering activity" as certain offenses "chargeable under state law" or "indictable under" federal law). By definition, every racketeering predicate is thus the focus of *another*

criminal prohibition. These predicates are not the focus of § 1962, in part because they do not need to be. Closer examination of § 1962's three subparts reinforces these points.

Section 1962(a) prohibits the use of racketeering "income" or "proceeds" to "invest" in an enterprise. Tellingly, that prohibition contains an exception for small investments that involve the purchase of less than one percent of a company's shares and do not confer "the power to elect one or more directors." The exception is thus keyed to the *de minimis* nature of the investment, not to the relative seriousness of the underlying racketeering activity. For example, the exemption applies to small investments of proceeds from a pattern of murder, but not to large investments of proceeds from a pattern of fraud in connection with a bankruptcy case (18 U.S.C. § 1961(1)(D)). The exception makes perfect sense because § 1962(a) focuses on investment in an enterprise, but would be capricious if the provision were instead focused on the underlying racketeering.

Section 1962(b) prohibits racketeering used to "acquire or maintain" an "interest" in an enterprise. Again, the statutory objective is clear: preventing organized crime, not from engaging in racketeering activity as such, but from doing so in order to gain sway over businesses, unions, and other enterprises. The prohibition does not target stand-alone patterns of racketeering, which would have been the obvious approach had the statute focused on racketeering *simpliciter*.

Section 1962(c) makes it unlawful "to conduct or participate ... in the conduct of [an] enterprise's affairs through a pattern of racketeering activity."

As this Court has explained, to "conduct" or "participate in" the "conduct of" an enterprise requires playing some role in "directing the enterprise's affairs." *Reves*, 507 U.S. at 178; *see also Boyle v. United States*, 556 U.S. 938, 945 n.3 (2009) (citing "requirement that [the] enterprise must be 'directed'" by the defendant). Again, the touchstone of criminal liability is not whether the defendant engaged in racketeering, but whether he exerted a corrupting influence *on the enterprise* by directing its affairs through racketeering.

Of course, RICO by its terms "encompasses both legitimate and illegitimate enterprises." *Turkette*, 452 U.S. at 578. Although "the primary purpose of RICO is to cope with the infiltration of legitimate businesses," the statute also extends to organizations with "no legitimate dimension." *Id.* at 591; *see* 18 U.S.C. § 1961(4) (defining enterprise to include any "group of individuals associated in fact"). Yet, "whether the enterprise be ostensibly legitimate or admittedly criminal," *Turkette*, 452 U.S. at 585, abuse of the "enterprise" remains the clear focus of the statute. Where the enterprise is legitimate, RICO "protects [it] from those who would use unlawful acts to victimize it"; where the enterprise was corrupt from the start, RICO forbids using it "as a 'vehicle'" through which to commit further crime. *Cedric Kushner*, 533 U.S. at 164. Both are forms of enterprise corruption, and while Congress primarily contemplated the former, it drafted broadly enough to cover the latter too. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils").

Ultimately, though, the critical point is that RICO does not target racketeering alone, but only insofar as it is used to influence a distinct "enterprise."

Morrison itself is highly parallel. There, § 10(b) "punishe[d] not all acts of deception, but only such acts 'in connection with the purchase or sale of any security.'" 561 U.S. at 272. As this Court explained, the "focus" of § 10(b) accordingly was not the wrongful conduct—the "acts of deception" or fraud "*simpliciter*"—but rather the securities transactions whose integrity was at risk from the use of deception "in connection" therewith. *Id.* at 266-67, 272. In just the same way, RICO does not punish racketeering activity alone, or even patterns of racketeering activity alone, but only such patterns "in connection with" the corruption of an "enterprise." *Sedima*, 473 U.S. at 497. Accordingly, the "focus" of § 1962 is not the racketeering *simpliciter*, but rather the enterprises whose integrity it threatens.

4. In two respects, RICO's civil remedies confirm that § 1962 focuses on enterprise corruption.

First, § 1964(a) sets forth in enterprise-focused terms the injunctive relief available to the government in civil enforcement actions. It provides for injunctions ordering the divestiture "of any interest, direct or indirect, in any enterprise"; injunctions "ordering dissolution or reorganization of any enterprise"; and injunctions "imposing reasonable restrictions on the future activities or investments of any person." But it does not provide for injunctions against the commission of future racketeering acts—a strange omission if such acts were the focus of § 1962.

Second, § 1964(c) affords a private right of action for "any person injured in his business or property," but does not extend to personal injuries. The economic focus of § 1964(c) makes perfect sense given the focus of § 1962 on the corruption of enterprises, but would make little sense if the focus of § 1962 were on racketeering activity as such. In the latter case, it would be strange to afford a civil remedy to the owner of a building destroyed by predicate acts of terrorism, but not to a person injured by the same acts. Likewise, the first and most serious predicate crime defined as "racketeering activity" under RICO is murder, and a private right of action for an injury to "business or property" arising from a pattern of murder borders on the nonsensical.

* * *

In sum, the indisputable focus of § 1962 is on preventing the corruption of enterprises, not on the predicate acts already criminalized by other statutes.

B. There is No Clear Indication That RICO's Substantive Provisions Extend To The Corruption of Foreign Enterprises

Because the focus of § 1962 is on preventing the corruption of enterprises, the presumption against extraterritoriality limits that provision to domestic enterprises, absent a clear indication that Congress intended also to cover foreign enterprises. RICO contains no such clear indication. To the contrary, it affirmatively suggests that Congress was concerned only about preventing the infiltration, acquisition, and operation of domestic enterprises, not about preserving the integrity of foreign enterprises.

1. Nothing in RICO suggests that § 1962 prohibits using the proceeds from a pattern of racketeering to invest in a *foreign* enterprise, using a pattern of racketeering to acquire a *foreign* enterprise, or conducting the affairs of a *foreign* enterprise through a pattern of racketeering.

To begin, RICO's definition of "enterprise" is silent on its own application to foreign enterprises. RICO defines the term "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). That definition makes no reference to geographic parameters. Moreover, while it does use the word "any," this Court repeatedly has held that "generic terms like 'any' or 'every' do not rebut the presumption against extraterritoriality." *Kiobel*, 133 S. Ct. at 1665; *see also Small*, 544 U.S. at 388; *Foley Bros.*, 336 U.S. at 287-88. Silence on the specific issue of territorial scope is thus construed as an implicit domestic limitation on the focus—here, the enterprise element. And this particular silence, in RICO's definitional provision, is particularly notable because a definitional provision in the federal antitrust laws—on which RICO was modeled in part, *see Holmes v. SIPC*, 503 U.S. 258, 267 (1992)—extends those laws to foreign enterprises. 15 U.S.C. § 7 (defining "person" for antitrust purposes "to include corporations and associations existing under or authorized by ... the laws of any foreign country").

Moreover, RICO's substantive provisions are also silent on the geographic scope of the covered enterprises. The only "foreign" references there—or

anywhere else in the statute—are the references to enterprises that engage in or affect "interstate or foreign commerce." 18 U.S.C. § 1962(a), (b), (c). But, again, this Court repeatedly has held that such jurisdictional references to "foreign commerce" establish nothing about substantive territorial scope: "statutes that contain broad language in their definitions of 'commerce' that expressly refer to '*foreign* commerce' do not" defeat the presumption. *Aramco*, 499 U.S. at 251-52; *see also Morrison*, 561 U.S. at 263; *Chisholm*, 268 U.S. at 30-31.

2. Far from establishing any clear indication that § 1962 extends to foreign enterprises, the text of RICO suggests just the opposite.

RICO's statutory findings and purpose are particularly instructive. In enacting RICO, Congress specifically found that "organized crime in the United States is [] highly sophisticated," that it uses its considerable economic power "to infiltrate and corrupt legitimate businesses and labor unions," that these "activities in the United States" both "weaken the stability of the Nation's economic system" and "undermine the general welfare of the Nation and its citizens," and that the "purpose" of RICO was thus "to seek the eradication of organized crime in the United States." 84 Stat. at 922-23. These various statements establish not only a focus on enterprises, but also a particular concern for *domestic* enterprises. They are squarely implicated by the infiltration of a business or union in Boston, but not by similar infiltrations in Berlin or Bogotá.

This statutory concern—to prevent the corruption of domestic enterprises—is particularly obvious as to § 1962(a) and (b). After all, it is

implausible that Congress would be concerned with corrupting investments in, or acquisitions of, foreign enterprises. Even for § 1962(c), Congress's concern does not clearly extend to foreign enterprises, as explained further below (*infra* at 38-40). And regardless, the implausibility of extending the first two subsections to foreign enterprises counsels strongly against so extending the third. Identical terms used in different parts of a statute presumptively "have the same meaning." *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990). That principle applies with particular force here, where the words at issue appear in three consecutive subsections of a single statutory provision, in what is obviously a deliberately sequenced "three-part structure" (*Reves*, 507 U.S. at 182-83). Moreover, "enterprise" is a defined term in RICO and thus either sweeps in foreign enterprises or not. It cannot be a "chameleon" with "different meaning" in different applications. *Clark v. Martinez*, 543 U.S. 371, 378, 382 (2005).

Finally, RICO's criminal remedies further cut against extending § 1962 to foreign enterprises. Section 1963(a)(2) requires forfeiture of any interest in "any enterprise" acquired or controlled in violation of § 1962. If the statute swept in foreign enterprises, it would thus require forfeiture of *foreign entities* to the U.S. government. *See Alexander*, 509 U.S. at 574 (Kennedy, J., dissenting) (noting that defendant forfeits "entire interest in the enterprise involved in the RICO violations"). The oddity of such a result confirms that Congress did not extend RICO to foreign enterprises. Moreover, RICO makes clear that the forfeiture applies "irrespective of any

provision of State Law." 18 U.S.C. § 1963(a)(2). Had Congress intended to provide for the forfeiture of foreign enterprises, the proviso presumably would have clarified that the forfeiture applies "irrespective of any provision of state *or foreign* law."

* * *

In sum, nothing in RICO remotely establishes a clear indication that § 1962 extends to foreign enterprises, and thus it is limited to domestic enterprises.

C. The Panel's Contrary Arguments Are Flawed

The panel did not engage at all on the question of what constitutes the "focus" of either RICO in general or § 1962 in particular. Instead, it simply reasoned that limiting RICO to domestic enterprises would be "illogical" (Pet.App. 13a-15a) and that extraterritorial predicate statutes constitute a clear indication of extraterritorial patterns (Pet.App. 9a-14a). This was error at every level.

1. As to enterprises, the panel conceded that "RICO does not qualify the geographic scope of the enterprise." Pet.App. 13a. Under the presumption against extraterritoriality, that alone should have been dispositive, given that the "enterprise" is clearly the focus of § 1962. Moreover, the panel also ignored the implausibility of construing § 1962(a) and (b) to reach investments in, or acquisitions of, foreign enterprises. That problem is also virtually dispositive, because the defined term "enterprise" cannot mean "domestic enterprise" in § 1962(a) and (b), but "foreign enterprise" in the immediately adjoining § 1962(c).

Nevertheless, fixating solely on the impact of limiting § 1962(c) to domestic enterprises, the panel reasoned that it "seems to us illogical" that a foreign enterprise could "sen[d] emissaries" to commit domestic racketeering activity, such that "foreigners [had] carte blanche to violate the laws of the United States in the United States." Pet.App. 14a. That analysis misperceives the operation of § 1962(c), under which the "person" directs the "enterprise," rather than vice versa. *See Reves*, 507 U.S. at 178-79. More fundamentally, it both misapplies *Morrison* and misunderstands the implications of limiting RICO to domestic enterprises.

As for *Morrison*, speculation about what "seems to us illogical" does not remotely suffice to displace the presumption against extraterritoriality. That requires a "clear indication" in statutory text or context, not a policy argument about the supposed desirability of extraterritorial application. *See Morrison*, 561 U.S. at 255. Moreover, *Morrison* itself held that § 10(b) of the Exchange Act does not proscribe domestic deception "in connection with" a *foreign* securities transition, as the latter was the focus of the statute. *Id.* at 266, 271-72.

Anyway, contrary to the panel's claim, limiting RICO to domestic enterprises hardly gives foreign persons or enterprises "carte blanche" to commit serious crimes in the U.S. Pet.App. 14a. For one thing, *any* RICO predicate offense—whether in connection with a domestic enterprise, a foreign enterprise, or no enterprise at all—can be the subject of a criminal prosecution under the predicate statute. For another, as Judge Raggi noted, many of the predicate statutes impose penalties that are equally

or even "more ... severe" than those available under RICO (which provides no mandatory minimum sentence, and generally provides a maximum sentence of only 20 years, *see* 18 U.S.C. § 1963(a)). Pet.App. 86a (dissenting from denial of en banc); *see, e.g.*, 18 U.S.C. § 1583 (human trafficking punishable by 20 years to life); *id.* § 2260 (sexual exploitation of children punishable by 30 years, or 50 years for repeat offenders). And, of course, that is particularly true for the murder-based examples conjured by the panel (Pet.App. 14a) and the terrorism-based examples conjured by Judge Hall on rehearing (Pet.App. 61a-62a). *See, e.g.*, 18 U.S.C. § 1958 (murder-for-hire punishable by death); *id.* § 2332b(g)(5) (terrorism-related federal offenses, some punishable by death). Thus, as Judge Raggi explained, "it raises a false alarm to suggest that prosecutors will be thwarted in bringing terrorists to justice unless we recognize RICO to extend extraterritorially to foreign enterprises conducted through foreign patterns of racketeering upon the pleading of any extraterritorial-crime predicate." Pet.App. 87a (dissenting from denial of en banc).

In any event, the panel's foreign "emissaries" hypothetical likely could be reached under RICO as well, by charging a distinct domestic enterprise. "[A]n association-in-fact enterprise is simply a continuing unit that functions with a common purpose." *Boyle*, 556 U.S. at 948. The "emissaries" imagined by the panel likely would themselves constitute a domestic association-in-fact "enterprise." And the ringleaders of that "enterprise" likely would violate § 1962(c), by conducting its affairs through a "pattern of racketeering activity."

2. As to patterns, the panel noted that some RICO predicate statutes can apply extraterritorially, and a few apply only extraterritorially. Pet.App. 9a-11a. From this, the panel concluded that "RICO applies extraterritorially if, and only if, liability or guilt could attach to extraterritorial conduct under the relevant RICO predicate." Pet.App. 9a. The panel reasoned that Congress, by "incorporating" these predicate statutes into RICO, "clearly communicated its intention that RICO apply to extraterritorial conduct to the extent that extraterritorial violations of those statutes serve as the basis for RICO liability." Pet.App. 11a. There are at least two critical flaws with that reasoning.

First, and most fundamentally, the panel's analysis addresses the wrong question. Because § 1962's "focus" is on corruption of the "enterprise," the relevant question is not whether the predicate statutes or even the "pattern" element exhibit a clear indication of extraterritorial application, but whether the "enterprise" element does so. The panel's analysis at most suggests that the foreign reach of the *predicate statutes* implies that RICO extends to foreign *patterns*. After all, Congress did not incorporate the predicate statutes into RICO in the abstract. Rather, it incorporated them into a statutory definition of "racketeering activity," 18 U.S.C. § 1961(1), and then incorporated that definition into the further statutory definition of "pattern of racketeering activity," *id.* § 1961(5). This precise chain of incorporation in no way suggests that RICO extends to foreign *enterprises*. Instead, it suggests that such foreign patterns are covered in connection with *domestic* enterprises.

Indeed, if the panel were correct that Congress addressed the territorial scope of the "pattern" element, but remained silent on the territorial scope of the "enterprise" element, that premise would undermine—not advance—the conclusion that RICO extends to foreign enterprises. Congress's purported incorporation of extraterritoriality language into the definition of "pattern," and its omission of such language from the nearby definition of "enterprise," would strongly suggest that the omission was intentional. *See, e.g.*, *Russello*, 464 U.S. at 23; *see also Morrison*, 561 U.S. at 265 ("Section 30(a) contains what § 10(b) lacks: a clear statement of extraterritorial effect.").

Second, even on its own terms, the panel's analysis does not establish a clear textual indication to extend RICO to foreign patterns of racketeering. That is unsurprising, as *every* court to address the issue since *Morrison*—except for the panel below—has concluded that RICO itself contains no clear indication of its own extraterritoriality. Pet. 16-18. Neither the "pattern" definition, 18 U.S.C. § 1961(5), nor even the definition of "racketeering activity," *id.* § 1961(1), says anything about extraterritoriality. To be sure, the latter definition does incorporate "any act which is indictable" under various enumerated federal statutes, some of which themselves apply extraterritorially. *See id.* Again, however, "it is well-established that generic terms like 'any' or 'every' do not rebut the presumption against extraterritoriality." *Kiobel*, 133 S. Ct. at 1665.

The panel reasoned that the incorporation of extraterritorial predicate statutes into RICO would serve no purpose if the "pattern" element applied

only domestically. That is incorrect. As to predicate statutes that cover *both* foreign and domestic conduct, Congress could have meaningfully incorporated them solely for their domestic applications. And even as to the predicate statutes that cover *only* foreign conduct, Congress could have meaningfully incorporated them solely for when such offenses are part of a broader pattern whose overall locus is domestic. Pet.App. 85a (Raggi, J., dissenting from denial of en banc). Since these interpretations are "possible," it was error for the panel to "override the presumption against extraterritoriality" by extending RICO to wholly foreign patterns. *Morrison*, 561 U.S. at 264. In any event, even if RICO's "pattern" element did extend to foreign patterns involving the very few *exclusively* extraterritorial predicate offenses (none of which is involved here), that would hardly show that the "pattern" element also extends to foreign patterns involving predicate offenses under statutes that are *not* exclusively extraterritorial. *See, e.g.*, *Morrison*, 561 U.S. at 265 (presumption "operate[s] to limit [extraterritorial] provision[s] to [their] terms"); *Microsoft*, 550 U.S. at 456 (even if overcome, presumption "remains instructive" in determining the "extent" of extraterritorial application).

* * *

In sum, the panel's analysis completely fails to refute our showing that § 1962's "focus" is the corruption of enterprises, and that it is limited to domestic enterprises because Congress provided no "clear indication" that it extends to foreign ones too.

III. RICO'S PRIVATE CAUSE OF ACTION DOES NOT REACH FOREIGN INJURIES

The panel compounded its error by failing to apply extraterritoriality principles to § 1964(c), which creates a private right of action in favor of "[a]ny person injured in his business or property by reason of a violation of section 1962." Without any supporting authority, the panel reasoned that any "*conduct*" the government may criminally prosecute under § 1962 also gives rise to a private civil claim under § 1964(c), even for foreign injuries. Pet.App. 57a-58a.

However, § 1964(c) is a separate provision from § 1962 and so, under *Morrison*, its "focus" for extraterritoriality purposes must be analyzed separately. In particular, the "focus" of § 1964(c) is on redressing *injuries* caused by RICO violations, and nothing in the text or context of § 1964(c) clearly rebuts the presumption that it applies only to *domestic* injuries. Indeed, if § 1962 did extend to foreign enterprises and patterns, that would make it all the more important to limit § 1964(c) to domestic injuries. Especially if criminal RICO may be foreign-squared, civil RICO should not be foreign-cubed.

A. The "Focus" of RICO's Private Cause Of Action Is On Injuries Caused By RICO Violations

The "focus" of § 1964(c) is different from that of § 1962. The latter operates to *prohibit the wrongful conduct* of corrupting enterprises in specified ways; the former operates to *redress injuries* caused by that unlawful conduct.

1. This Court's decisions make clear that different provisions in a single statute may have different foci—and thus different geographic sweep. *See, e.g.*, *Morrison*, 561 U.S. at 265, 268 (expressly holding that the territorial scope of § 10(b) of the Exchange Act differs from that of § 30(a) and (b)); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439-41 (1989) (same for 28 U.S.C. § 1605(a)(5) and immediately adjoining § 1605(a)(2)); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 588 (1992) (Stevens, J., concurring) (separately analyzing § 7(a)(2) of Endangered Species Act and other ESA sections). Accordingly, any extraterritoriality analysis must proceed provision-by-provision, not statute-by-statute.

That is especially true when analyzing the scope of a private right of action. "[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979); *see also Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 190 (1994) (rejecting contention that "a private right of action exists for all injuries caused by violations of criminal prohibitions"). Instead, whether to create a private cause of action, and of what scope, is a policy decision that Congress must independently address. *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001).

Accordingly, "[t]he scope of the private right of action," if Congress chooses to create one at all, may well be "more limited than the scope of the statutes upon which it is based." *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058, 1063 (2014). That is why the

government in *Morrison* urged this Court, in deciding the extraterritorial issue, to "[d]istinguis[h] between limits on Section 10(b)'s substantive prohibition and additional limits that constrain only the implied private right of action." Br. for United States at 12, 561 U.S. 247 (No. 08-1191).

In short, there is no basis to assume that a criminal prohibition and a corresponding private right of action are coextensive in their "focus," or their geographic scope, any more than to assume that they are coextensive in any other respects.

2. The clear focus of § 1964(c) is on redressing *injuries* caused by RICO violations. Section 1964(c) permits "'any person injured in his business or property by reason of a violation of' RICO's criminal provisions to recover treble damages and attorney's fees." *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 183 (1997). Section 1964(c) thus affords relief for certain harms, which are clearly the "objects of its solicitude." *Morrison*, 561 U.S. at 267.

Indeed, redressing private injuries is the *only* thing § 1964(c) seeks to do, for § 1962 makes independently unlawful all of the conduct that can cause a compensable injury. Section 1964(c) thus does not punish violations of § 1962 *simpliciter*, but only violations in connection with certain economic injuries: namely, injuries to business or property that are proximately caused by the violation. *Holmes*, 503 U.S. at 265-68. The cause of action in § 1964(c) is thus focused on the injury, not the underlying offense. *See Morrison*, 561 U.S. at 272.

Moreover, this Court has explained that the purpose of § 1964(c) is to ensure that "innocent

parties who are the victims of organized crime have a right to obtain proper redress." *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 241 (1987). In fact, "Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws," *Holmes*, 503 U.S. at 267, which "seeks primarily to enable an injured competitor to gain compensation for that injury," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985). It is thus no surprise that Congress enacted § 1964(c) with a similar purpose in mind—to give "'those who have been wronged by organized crime ... access to a legal remedy.'" *Shearson*, 482 U.S. at 240.

B. There Is No Clear Indication That RICO's Private Cause of Action Extends To Foreign Injuries

Because the focus of § 1964(c) is on redressing injuries, the presumption against extraterritoriality limits that provision to domestic injuries, absent a clear indication that Congress intended also to cover foreign injuries. RICO contains no such clear indication. To the contrary, § 1964(c) is best read as limited to domestic injuries.

1. Nothing in RICO suggests that § 1964 reaches foreign injuries.

To begin, § 1964(c) by its terms does not address its own geographic scope. Rather, it simply provides that "[a]ny person injured in his business or property by reason of a violation of section 1962" may sue for treble damages and fees. Again, such "generic" language—including use of the word "any"—cannot rebut the presumption against extraterritoriality. *See, e.g., Kiobel*, 133 S. Ct. at 1665.

Nor does any other RICO provision bear on this question. Neither RICO's definitional section, 18 U.S.C. § 1961, nor its substantive provisions, *id.* § 1962, addresses the question whether foreign injuries are compensable. And, as explained above, any extraterritorial application of § 1962 would not resolve the geographic scope of § 1964(c). *See, e.g.*, *Morrison*, 561 U.S. at 265.[5]

2. Indeed, construing § 1964(c) as limited to domestic injuries is the best reading of the statute.

First, choice-of-law principles strongly support a domestic-injury limitation to civil RICO. In *Sosa v. Alvarez Machain*, 542 U.S. 692 (2004), this Court held that the foreign-country exception to the Federal Tort Claims Act, which bars injured parties from suing the federal government for tort *claims* "arising in a foreign country," applies only to *injuries* "occurring in a foreign country." *Id.* at 704. Applying that rule, the Court held that a plaintiff could not sue the United States for injuries sustained in Mexico and caused by the negligence of federal officials acting in the United States. *See id.* at 700-03. The Court reasoned that, when the FTCA was

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[5] In fact, Congress often affords private remedies that are geographically narrower than the associated substantive prohibitions. For example, after *Morrison*, Congress amended the Exchange Act to resurrect the "conduct" and "effects" tests for SEC actions. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(b)(2)(A), 124 Stat. 1376, 1864 (2010). At the same time, however, it expressly declined to make corresponding amendments for comparable actions brought by injured private parties. *See id.* § 929Y, 124 Stat. at 1871.

enacted, "the dominant principle in choice-of-law analysis for tort cases was *lex loci delecti*: courts generally applied the law of the place where the injury occurred." *Id.* at 705. Moreover, even under the more "flexible" choice-of-law rules that later gained traction, the traditional rule still generally prevailed for tort claims: "'On occasion, conduct and personal injury will occur in different states. In such instances, the local law of the state of injury will usually be applied to determine most issues involving the tort.'" *Id.* at 709 (quoting Restatement (Second) of Conflicts of Laws, § 146, cmt. *e*); *see also id.* at 706 ("For a plaintiff injured in a foreign country," American courts would typically "apply foreign law to determine the tortfeasor's liability."). Accordingly, the Court concluded, the FTCA is best read to incorporate the settled, background place-of-injury rule. *See id.* at 705-11.

Moreover, just last week, this Court applied similar reasoning in construing an exception to the Foreign Sovereign Immunities Act for claims "based upon a commercial activity carried on in the United States." *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 394 (2015). *Sachs* involved a plaintiff injured in Austria by tortious conduct alleged to have occurred in part in the U.S. In dismissing the claims, the Court reasoned that the "essentials" of the claims occurred in Austria, largely because the plaintiff's injury occurred there. *Id.* at 397. The Court quoted with approval a pithy summation of the place-of-injury rule by Justice Holmes: "the 'essentials' of a personal-injury narrative will be found at the 'point of contact'—'the place where the boy got his fingers pinched.'" *Ibid.*

The same reasoning should govern here. When RICO was enacted in 1970, the place-of-injury rule was still "dominant" for tort claims. *Sosa*, 542 U.S. at 705, 709. All impacted sovereigns—including Congress—would have assumed that European law would govern tort or tort-like claims by European governments for injuries they suffered in Europe. Accordingly, RICO should be construed to preserve that understanding, *see id.* at 705-11, and thus to "'protect against unintended clashes between our laws and those of other nations,'" *Kiobel*, 133 S. Ct. at 1664 (quoting *Aramco*, 499 U.S. at 248).

Second, this Court has limited the applicability of antitrust law to foreign injuries. In *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), the Court held that, even though the antitrust laws apply to foreign conduct, private plaintiffs cannot sue "to redress foreign injury" caused by foreign conduct. *Id.* at 169. Moreover, the Court so held even though the government could have sued to enjoin the same conduct. *See id.* at 170-73. The Court explained that this dichotomy existed not only under the specific antitrust amendments directly at issue, *see id.* at 161-62, but also under the original, general terms of federal antitrust law. *See id.* at 169-73. Under both, the result was driven not by text clearly excluding recovery for foreign injuries, but by the principle that "this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *Id.* at 164.

There is no reason to think that § 1964(c) should be governed by the opposite rule. To the contrary, because "Congress modeled § 1964(c) on the civil-

action provision of the federal antitrust laws," *Holmes*, 503 U.S. at 267, there is good reason to construe those provisions *in pari materia*. *See, e.g.*, *id.* at 267-68; *Shearson*, 482 U.S. at 241. Thus, § 1964(c) should not be construed to permit recovery for foreign injuries, and certainly not for foreign injuries arising out of foreign conduct.[6]

Finally, a domestic-injury rule makes good sense. When substantive criminal law is made extraterritorial, at least the government can mitigate international friction through the exercise of enforcement discretion, which it applies with commendable rigor in the specific context of RICO. *See* Organized Crime & Racketeering Section, Criminal Division, Department of Justice, *Criminal RICO: A Manual For Federal Prosecutors*, Preface (5th ed. 2009) ("All pleadings alleging a violation of RICO ... must be submitted to OCRS for review and approval before being filed with the court."). But private plaintiffs, unlike federal prosecutors, have no such duties or oversight. *See, e.g.*, *Morrison*, 561 U.S. at 284 n.12 (Stevens, J., concurring) (government enforcement "pose[s] a lesser threat to international comity"); Joseph P. Griffin,

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[6] Respondents have previously argued that *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978), an antitrust case, supports an extension of § 1964(c) to foreign injuries. But *Pfizer* merely held, based on the antitrust definition of "person," that foreign nations may "sue for treble damages under the antitrust laws to the same extent as any other plaintiff." *Id.* at 320. *Pfizer* did not address whether foreign *injuries* are redressable under antitrust laws. As *Empagran* subsequently made clear, such foreign injuries are not redressable, at least when they arise out of foreign conduct.

Extraterritoriality in U.S. and EU Antitrust Enforcement, 67 ANTITRUST L.J. 159, 194 (1999) ("private plaintiffs often are unwilling to exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S. Government").

On top of all that, civil RICO has "evolv[ed] into something quite different from the original conception of its enactors," *Sedima*, 473 U.S. at 500, as private plaintiffs now invoke its treble-damages remedy for everything from garden-variety business disputes, *see id.*, to ATS-like human-rights litigation, *see* WLF Cert. Amicus Br. at 13-17. Of course, that is no reason to depart from RICO's plain language, but it *is* reason to adhere to the presumption against extraterritoriality: the "widespread abuse of civil RICO" (*Midwest Grinding Co. v. Spitz*, 976 F.2d 1016, 1025 (7th Cir. 1992)) should not be allowed to metastasize around the globe.

C. The Panel's Contrary Arguments Are Flawed

After entirely ignoring the injury question in its original opinion, the panel badly botched it on rehearing. The panel did not suggest that § 1964(c) is focused on anything other than redressing injuries, and it likewise did not identify any clear textual indication that the provision applies to foreign injuries. For the reasons explained above, the panel's inability to contest either of those critical points should be dispositive.

Instead, the panel primarily reasoned that the presumption against extraterritoriality governs only

questions regarding what primary "*conduct*" a federal statute encompasses, and thus does not apply at all to questions regarding the *injuries* for which a federal statute provides redress. Pet.App. 57a-58a. The panel additionally reasoned that construing § 1964(c) to afford redress only for domestic injuries would be inconsistent with *Sedima* (Pet.App. 56a) and with the general interpretive principle that RICO should be "liberally construed" (Pet.App. 58a). None of these rationales withstands scrutiny.

1. The panel fundamentally erred in concluding that the presumption against extraterritoriality cannot apply to questions of injury as opposed to conduct. Abundant precedent rebuts that contention.

In *Chisholm*, this Court applied the presumption to hold that the Federal Employers' Liability Act, which provides a statutory cause of action to railroad workers injured in the course of their employment, does not extend to "an injury in a foreign country." 268 U.S. at 30. *Chisholm* involved an American citizen employed by an American carrier on a route between New York and Montreal. The Court held that, because the employee had "suffered fatal injuries at a point thirty miles north of the international line," FELA did not apply. *Id.* In so doing, the Court specifically invoked the principle that "'[l]egislation is presumptively territorial.'" *Id.* at 31.

Similarly, in *Lauritzen v. Larsen*, 345 U.S. 571 (1953), this Court applied *Chisholm* to hold that the Jones Act, which provides a statutory cause of action for seamen injured in the course of their employment, also does not extend to foreign injuries.

Accordingly, it ordered the dismissal of a Jones Act claim brought by a seaman injured "in the course of employment, while in Havana harbor." *Id.* at 573. The Jones Act by its terms covers "any seaman," but this Court construed that language not to extend "to foreign events or transactions." *Id.* at 579. Finally, *Lauritzen* cannot possibly have rested on a place-of-the-negligence rule, as opposed to a place-of-the-injury rule, because the Jones Act affords at least one remedy (maintenance and cure) without regard to any negligence. *See id.* at 577.

Moreover, the Second Circuit's reasoning is inconsistent with this Court's cases involving the presumption against extraterritoriality, which have never distinguished *substantive* provisions from *remedial* ones, but have applied the presumption uniformly to *all* "legislation of Congress," *Morrison*, 561 U.S. at 255—including procedural provisions akin to § 1964(c). For example, *Kiobel* applied the presumption to the Alien Tort Statute, a law that "does not directly regulate conduct or afford relief," 133 S. Ct. at 1664, but is merely jurisdictional in nature. And *Sale* applied it to a statutory provision governing the *procedures* the Attorney General must follow with respect to deportations. 509 U.S. at 170, 173-74. If the presumption governs even such purely procedural provisions, then surely it governs § 1964(c), which creates a new federal cause of action. *See also Empagran*, 542 U.S. at 164, 173-74 (limiting private right of action, even though conduct was plainly proscribed and subject to prosecution).

Indeed, the Second Circuit recognized as much in a different decision. In *Loginovskaya v. Batratchenko*, 764 F.3d 266 (2d Cir. 2014), the

plaintiff argued "that *Morrison* governs substantive (conduct-regulating) provisions rather than procedural provisions such as" the private right of action at issue. *Id.* at 272. The court flatly rejected that contention. The court explained that *Morrison* "draws no such distinction"; that it "holds that the presumption applies generally to 'statutes'"; and that it "discouraged courts from making fussy distinctions in deciding whether or not the presumption applies." *Id.* Likewise, the court explained, the proposed distinction "between substantive provisions and those that only create a cause of action" is also "foreclosed by *Kiobel*." *Id.*

Finally, the panel's reasoning is inconsistent not only with this considerable body of precedent explicitly applying the presumption to questions of injury, cause of action, and other non-substantive matters, but also with *Sosa* and *Empagran*. While *Sosa* had no occasion to invoke the presumption explicitly, the choice-of-law principles that it applied also animate the presumption. *See, e.g.*, *Lauritzen*, 345 U.S. at 583-89; *Chisholm*, 268 U.S. at 31-32. Similarly, while *Empagran* described itself as a case turning on international "comity," it too is now widely understood as resting on the presumption. *See, e.g.*, *Microsoft*, 550 U.S. at 456; *Morrison*, 561 U.S. at 280 (Stevens, J., concurring in the judgment); *Pasquantino*, 544 U.S. at 378-79 (Ginsburg, J., dissenting).

2. The panel's alternative rationales are even weaker. As for *Sedima* (Pet.App. 56a), that case merely held that § 1964(c) does not require a "racketeering" injury above and beyond harm to business or property proximately caused by a

substantive RICO violation. 473 U.S. at 494-98. The Court was not presented with, and did not address, any question about extraterritoriality.

Nor is the principle that RICO should be "liberally construed" (Pet.App. 58a) a license to disregard the presumption against extraterritoriality. If use of sweeping but general terms like "any" or "every" does not overcome the presumption, *see Kiobel*, 133 S. Ct. at 1665, then neither does use of a broad but vague canon regarding liberal construction.

* * *

In sum, contrary to the panel, the presumption against extraterritorially fully applies to statutes creating private rights of action, which are distinct from the underlying substantive provisions. Here, § 1964(c)'s "focus" is on injury, and it is limited to domestic injuries because Congress provided no "clear indication" that it extends to foreign ones too.

IV. RESPONDENTS' RICO CLAIMS SHOULD BE DISMISSED

Under either of the two extraterritoriality rules explained above, the RICO claims in this case must be dismissed. After nearly 15 years of litigation, six different complaints, and three dismissals, the time has come to put these claims to an end.

1. The operative complaint fails to allege a domestic enterprise. It alleges a single enterprise: an "association-in-fact" labeled the "RJR Money-Laundering Enterprise" and defined as petitioners, drug traffickers, and "associated distributors, shippers, currency dealers, wholesalers, money brokers, and other participants" working together to

launder the proceeds of illegal drug sales in Europe. Pet.App. 237a-238a. Applying the conventional "nerve-center" test used to identify the location of a corporation or association, *Hertz*, 559 U.S. at 92-93, the district court held that this alleged enterprise was foreign. Pet.App. 51a-52a. The Second Circuit did not question that holding, Pet.App. 14a, and respondents did not dispute it in opposing certiorari—thereby waiving the point. *See Baldwin v. Reese*, 541 U.S. 27, 34 (2004); *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 171 (1999).

Furthermore, the district court's holding was clearly correct. The nerve-center test looks to the headquarters of the entity—the place from where it is directed and controlled. *Hertz*, 559 U.S. at 93. Here, petitioners are alleged to be, at worst, enablers of a scheme masterminded and controlled from abroad, by foreign organized criminals. Petitioners are, as the district court correctly held, "nothing more than sellers of fungible goods in a complex series of transactions directed by South American and Russian gangs." Pet.App. 52a. Indeed, the fungibility of Petitioners is confirmed by Respondents' filing almost identical RICO actions against various *other* tobacco manufacturers. *Supra* at 7 n.2. At its core, the alleged global association is plainly a "foreign" enterprise.

In its amended opinion, the panel briefly suggested an entirely different enterprise theory: that the complaint states a claim under § 1962(a) for the alleged investment of racketeering proceeds in the Brown & Williamson Tobacco Company ("B&W"), a domestic enterprise. Pet.App. 13a-14a n.5. However, the complaint never alleges that B&W was

the RICO enterprise. Rather, Count 1, which sets forth the claim under § 1962(a), rests entirely on the foreign-based "RJR Money-Laundering Enterprise." Pet.App. 237a-238a. It alleges that this "RJR Money-Laundering Enterprise" exhibits sufficient common purpose, ascertainable structure, and continuity to satisfy RICO's statutory definition of an "enterprise." Pet.App. 238a. After making pattern allegations (Pet.App. 238a-250a), the complaint then alleges the prohibited investment. It says that the defendants used racketeering proceeds "to acquire an interest in, establish, and operate the RJR Money-Laundering Enterprise." Pet.App. 251a (¶ 162). Next, in the very paragraph cited by the panel, the complaint repeats the allegation that petitioners used racketeering proceeds "to acquire an interest in, establish, and operate the RJR Money-Laundering Enterprise." *Id.* (¶ 163). B&W is not so much as mentioned in Count 1 of the complaint.

Moreover, the difference between the claim actually asserted (based on the alleged acquisition of the "RJR Money-Laundering Enterprise") and the claim imagined by the panel (based on the acquisition of B&W) is no mere pleading quibble. Under the latter theory, respondents would have to prove not that they were injured by the alleged investment in a sprawling "Money-Laundering Enterprise" with tentacles around the globe, but that they were injured by Reynolds' domestic acquisition *of B&W*. As the text of § 1962(a) makes clear, and as the panel acknowledged, damages for a § 1962(a) claim must flow not from the predicate acts, but from the investment in the enterprise. Pet.App.13a n.5; *Ouaknine v. MacFarlane*, 897 F.2d 75, 83 (2d Cir.

1990). The complaint does not, and could not, allege damages from Reynolds' domestic investment in B&W. Indeed, the dozens of paragraphs alleging respondents' injuries *never mention* B&W. Pet.App. 210a-227a. Thus, the B&W-as-enterprise claim would have been dismissed if respondents had alleged it, which they did not.

2. The complaint also fails to adequately allege any domestic injuries. The vast bulk of alleged injuries are sovereign harms supposedly suffered by respondents within their own borders, such as harm to their economies and financial institutions, instability of the Euro, increased law-enforcement costs, and lost tax revenues. Pet.App. 215a-228a. These injuries are impermissibly foreign, and recovery for them has already been held barred by the revenue and penal-law rules. *See European Cmty.*, 355 F.3d at 131-38 (Sotomayor, J.).

To avoid the latter problem, respondents now allege proprietary injuries suffered as competing cigarette sellers. Pet.App. 210a-215a. In describing their commercial activities, respondents say that "[m]any" (but not all) of them have manufactured or sold cigarettes, including as lawful monopolists, "within their borders." Pet.App. 139a. Any lost sales or profits they suffered "within their borders" in Europe also clearly constitute foreign injuries.

To be sure, respondents make a fleeting allegation of competitive injury "in the European Community and in other markets in which they compete including, but not limited to, the United States." Pet.App. 210a. However, the complaint does not even identify which of the European sovereign nations ever engaged in selling cigarettes,

much less selling cigarettes *in the United States*. Nor does it allege *when* any of them was so engaged. In addition, respondents do not explain how alleged money laundering in Colombia, Panama, and Venezuela, involving drug proceeds from Europe and cigarettes exported to Europe, could have proximately harmed, for example, the Grand Duchy of Luxembourg in any competition *in the U.S.* against Reynolds and other U.S. cigarette manufacturers. For all these reasons, the allegation that unspecified respondents, at unspecified times, suffered actionable competitive impacts in vaguely-specified markets "including" the U.S. is both too conclusory, and too implausible, to state a claim. *See, e.g., Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

3. Alternatively, this case should be remanded so that the lower courts may assess which portions of the RICO claims, if any, remain viable. In reversing the district court's dismissal, the panel ruled that a civil RICO claim may rest on a foreign racketeering pattern, a foreign enterprise, and a foreign injury. This case involves all three. Thus, if any of the holdings below is wrong, the judgment below must at least be set aside.

CONCLUSION

The judgment of the court of appeals should be reversed and the RICO claims dismissed. Alternatively, the judgment should be vacated and the case remanded for further proceedings consistent with the Court's opinion.

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APPENDIX

The Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, provides as follows:

§ 1961. Definitions

As used in this chapter —

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1351 (relating to fraud in foreign labor contracting), section 1425 (relating to the procurement of citizenship or nationalization

unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1592 (relating to peonage, slavery, and trafficking in persons), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), section 1960 (relating to illegal money

transmitters), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), sections 175-178 (relating to biological weapons), sections 229-229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled

substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten

years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. Prohibited Activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his

immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

§ 1963. Criminal Penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over; any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (l) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d) **(1)** Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed,

removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, that an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than fourteen days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the

earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall

expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(h) The Attorney General may promulgate regulations with respect to—

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for

violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(i) Except as provided in subsection (l), no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring

property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(l)

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title,

or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

> **(A)** the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts

which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section; the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(m) If any of the property described in subsection (a), as a result of any act or omission of the defendant—

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty; the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

§ 1964. Civil Remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in

which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

§ 1965. Venue and Process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without

approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

§ 1966. Expedition of Actions

In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action.

§ 1967. Evidence

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.

§ 1968. Civil Investigative Demand

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary

materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall—

(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(4) identify the custodian to whom such material shall be made available.

(c) No such demand shall—

(1) contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpena duces tecum issued by a court of the United States in

aid of a grand jury investigation of such alleged racketeering violation.

(d) Service of any such demand or any petition filed under this section may be made upon a person by—

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;

(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or

(3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f)

(1) The Attorney General shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(2) Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and

copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

(3) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representatives of such person.

(4) Whenever any attorney has been designated to appear on behalf of the United States before

any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(5) Upon the completion of—

(i) the racketeering investigation for which any documentary material was produced under this chapter, and

(ii) any case or proceeding arising from such investigation, the custodian shall return to the person who produced such material all such material other than copies thereof made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such

investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

(7) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General shall promptly—

(i) designate another racketeering investigator to serve as custodian thereof, and

(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated. Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which

such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(i) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of

such court requiring the performance by such custodian of any duty imposed upon him by this section.

(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the material so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section.